

## HKEx LISTING DECISION

Cite as HKEx-LD42-4 (December 2004)

[\[Streamlined and incorporated into the Guide for New Listing Applicants in January 2024\]](#)

<b>Summary</b>	
<b>Category</b>	Listing Decisions Series 42-4 (LD42-4)
<b>Name of Parties</b>	Company A - a Main Board listing applicant Subsidiary X- the only operating subsidiary of Company A
<b>Subject</b>	Whether the requirements for ownership continuity and control under Rule 8.05(1)(c) were satisfied when the controlling shareholder held a large part of its shareholding interests in Subsidiary X (over 45% thereof) through a trust arrangement in the most recent audited financial year in the track record period?
<b>Listing Rule</b>	Rule 8.05(1)(c)
<b>Decision</b>	<p>Based on the Exchange’s analysis of Rule 8.05(1)(c), the Exchange considered that the requirements of ownership continuity and control for, at least, the most recent audited financial year were satisfied based on:-</p> <ol style="list-style-type: none"><li>a. the controlling shareholder held over 45% equity interest in Subsidiary X (the “Entrusted Shares”) pursuant to the Entrustment Agreement which effectively enabled the controlling shareholder’s predecessor to exercise all the rights of and control over the Entrusted Shares;</li><li>b. by aggregating the Entrusted Shares with other shareholdings in Subsidiary X held by the controlling shareholder’s predecessor at the material time, the controlling shareholder and its predecessor had as at the date of the signing of the Entrustment Agreement in Year 2, and since that date, become and continued to be the beneficial owner and in control of over 50% of the issued shares of Subsidiary X. It followed that the controlling shareholder had satisfied the ownership continuity and control requirements under Rule 8.05 for, at least, the most recent audited financial year ; and</li><li>c. the Exchange was not aware of any circumstances which might suggest that there had been a packaging of the business of the Group for the purpose of seeking a listing.</li></ol>

## SUMMARY OF FACTS

### *Before the track record period*

1. Subsidiary X, the only operating subsidiary of Company A, was incorporated as a joint stock limited company in the People’s Republic of China (the “PRC”) before the track record period of Company A.
2. The majority of its Subsidiary X's equity interests were owned by the following parties in the percentages stated below:-

**Chart 1**

<b>Owners</b>	<b>Attributable Shareholding Percentages</b>
Owner A, a PRC State-owned enterprise	Approximately 50%
Owner B, a PRC State-owned enterprise	Over 40%
Labour Union X, labour union of Subsidiary X	Over 5%

### *Year 2 of track record period - signing of Entrustment Agreement*

3. In the second year of the track record period of Company A (“Year 2”), Owner A and Labour Union X entered into an agreement (the “Entrustment Agreement”) whereby Owner A formally entrusted over 45% of its shareholding interests in Subsidiary X (“Entrusted Shares”) in favour of Labour Union X.
4. According to the Entrustment Agreement, Labour Union X was entitled to exercise all the shareholder rights of Owner A in respect of the Entrusted Shares, including the right to exercise the voting powers associated therewith, except for the right to receive dividends declared and to dispose of the Entrusted Shares. In consideration of the entrustment arrangements, Labour Union X was entitled to receive substantially all of the dividends declared or benefits attributable to the Entrusted Shares in the form of a fee.
5. It was also submitted that the entrustment arrangements were put in place because the PRC Company Law prohibits promoters (in this case, Owner A) from transferring their shares in joint stock companies (in this case, Subsidiary X) during the first three years of incorporation.

6. Below is a chart showing the respective shareholding percentages of the major shareholders of Subsidiary X upon the signing of the Entrustment Agreement:

**Chart 2**

<b>Owners</b>	<b>Attributable Shareholding Percentages</b>
Owner A	Approximately 50% <b>but as to over 45% thereof subject to Entrustment Agreement</b>
Labour Union X	Over 5% <b>together with over 45% thereof under Entrustment Agreement</b>
Owner B	Over 40%

***Year 3 of track record period and after***

7. In the third year of the track record period of Company A (“Year 3”), Labour Union X was succeeded by Labour Union Successor. The transfer did not involve change in the underlying shareholding interests and it was approved by the relevant PRC authorities.
8. The formal transfer of the legal title of the Entrusted Shares to Labour Union Successor was completed shortly after the track record period of Company A.

***Immediately before restructuring of Company A for the purpose of listing***

9. Company A was established as the holding company of Subsidiary X pursuant to a restructuring for the purpose of listing.
10. The respective shareholding percentages of the shareholders of Subsidiary X immediately before the restructuring is as follows:

**Chart 3**

<b>Owners</b>	<b>Attributable Shareholding Percentages</b>
Owner A	Less than 5%
Labour Union Successor	Over 50%
Others in aggregate	Less than 45%

***Additional facts submitted***

11. It was submitted by the sponsor of Company A that, by virtue of the Entrustment Agreement entered into in Year 2, Labour Union X was in a position to exercise all the rights of and control over the Entrusted Shares normally available to a shareholder in Subsidiary X.
12. In support of its case, Company A submitted to the Exchange legal opinions issued by its legal adviser in the PRC confirming that:-
  - The entrustment arrangements were valid and did not violate any PRC laws and regulation. The entrustment arrangements were subsequently confirmed by the relevant PRC authorities.
  - The transfer of equity interests by Labour Union X to Labour Union Successor was duly approved by the relevant PRC authorities.

### **THE ISSUE RAISED FOR CONSIDERATION**

13. Whether the requirements for ownership continuity and control under Rule 8.05(1)(c) were satisfied when the controlling shareholder, i.e. Labour Union Successor, held a large part of its shareholding interest in Subsidiary X (over 45% thereof) through a trust arrangement described above for the most recent audited financial year of the track record period ?

### **APPLICABLE LISTING RULE**

14. Rule 8.05(1)(c) provides that to meet the profit test, a new applicant must, amongst other criteria, have “*ownership continuity and control for at least the most recent audited financial year*”.

### **THE ANALYSIS**

15. As stated in the Consultation Paper on *Proposed Amendments To The Listing Rules Relating To Initial Listing And Continuing Listing Eligibility And Cancellation Of Listing Procedures* issued by the Exchange in July 2002, the Exchange used to interpret the old Rule 8.05 as requiring a new applicant to demonstrate, amongst other things, ownership continuity and control for at least the most recent audited financial year. Such interpretation was in recognition of the high probability that dominating shareholder or shareholders groups can exert substantial influence on the management of the group seeking listing during the track record period. Furthermore, such interpretation would help prevent listing applicants from “packaging” their businesses to meet the profit record requirement. This requirement was codified in the amended Listing Rules which came into effect on 31 March 2004.

16. In the “Frequently Asked Question” series published on the Exchange’s website in relation to the newly amended Listing Rules, “ownership continuity and control” is defined as the continuous ownership and control of the voting rights attaching to the shares by a controlling shareholder, or where there is no controlling shareholder, a single largest shareholder.
17. The Exchange considered that as at the date of the signing of the Entrustment Agreement in Year 2, and since that date, Labour Union X and its successor had become and continued to be the beneficial shareholder and in control of the majority of the shares (over 50%) in Subsidiary X. It followed that the ownership continuity and control requirements for at least the most recent audited financial year under Rule 8.05 had been satisfied.
18. The Exchange further considered that the entrustment arrangements and the subsequent transfer of legal ownership of Entrusted Shares to Labour Union Successor were not schemes to “package” the business of the Group to meet the profit record requirement.

## **THE DECISION**

19. Based on the material facts and the Exchange’s analysis of Rule 8.05(1)(c), the Exchange considered that Company A had satisfied the ownership continuity and control requirements for, at least, the most recent audited financial year by virtue of :-
  - a. Labour Union Successor, the controlling shareholder, held as to over 45% shareholding interests in Subsidiary X (the “Entrusted Shares”) pursuant to the Entrustment Agreement which effectively enabled its predecessor, Labour Union X, to exercise all the rights of and control over the Entrusted Shares;
  - b. by aggregating the Entrusted Shares with other shareholding interests in Subsidiary X held by Labour Union X at the material time, Labour Union X and its successor had as at the date of the signing of the Entrustment Agreement in Year 2, and since that date, become and continued to be the beneficial owner and in control of over 50% of the issued share of Subsidiary X. It followed that ownership continuity and control requirements had been maintained by Labour Union X and its successors for at least the most recent audited financial year under Rule 8.05 ; and
  - c. the Exchange was not aware of any circumstances which might suggest that there had been a packaging of the business of the Group for the purpose of seeking a listing.

